



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
Criminal Appeal 85 of 2008

[From Original Conviction and Sentence in Criminal Case No. 337 of 2007 of the Senior Resident Magistrate's Court at Taveta: J. M. Githaiga – SRM]

ALI MWARO MGANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Ali Mwaro Mganga, was charged in the Senior Resident Magistrate's Court at Taveta with the offence of defilement of a girl under the age of 15 years contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on the 2nd day of July 2007 at about 5.00 p.m., at K v in Taita Taveta District within Coast Province had carnal knowledge of LM, a girl under the age of 15 years.

The appellant appeared before J. M. Githaiga, then a Senior Resident Magistrate on 9th July 2007 and pleaded guilty. The Learned Senior Resident Magistrate then entered a plea of guilty but stated that due to the serious nature of the offence, he would hear the evidence and thereafter invite the appellant to confirm his plea of guilty. He therefore set the trial for 10th July 2007. That was rather unusual, but as the procedure did not prejudice the appellant, nothing much turns on the same.

The prosecution called Dr. Henry Ng'eno on 10th July 2007. He testified that after examining the complainant, LK, he concluded that she had been defied. She was tense and shocked and he noted tenderness on the right side of the stomach, her left wrist and thighs. Her genitalia were also smelly and the labia minora was bruised. Although no spermatozoa were seen, pus cells were noted. The same doctor also examined the appellant on whom he noted pus cells in his urine.

On the conclusion of the doctor's testimony, the Learned Senior Resident Magistrate reminded the appellant of the charge upon which the appellant stated that he was guilty but wanted the complainant to testify. The complainant's testimony was taken on 24th July 2007. An amended charge was read over to the appellant and when asked how he wished to plead, the appellant pleaded not guilty. The complainant then took the witness stand. After conducting a *voire dire*, the Learned Senior Resident Magistrate concluded that the complainant knew the meaning of an oath, the duty to tell the truth while on oath and the consequences of telling the court falsehoods while on oath. Her evidence was therefore taken on

oath. She testified that on the date and time in question, while looking for a stray cow, she met the appellant who held her by the hand and pulled her into the bushes. He removed her panties and pulled his long trousers down to his knees. He put her to the ground and inserted his penis into her vagina. She felt pain in her vagina and the appellant ejaculated on her. According to the complainant, the ordeal took ten minutes. The appellant then gave her Shs. 7/= and warned her not to tell anybody. She put on her panties. She went home and her uncle asked her about the Kshs. 7/= and the complainant informed her that the money had been given to her by the appellant after he had had sexual intercourse with her. The appellant who was then present denied the allegation and slapped her.

The complainant went to school the next morning and reported the incident to her teacher, VM who testified as PW 4. Her teacher in turn informed her head teacher, A N, PW 5, who also interviewed the complainant who narrated the incident to him. PW 5, then took her to Taveta Police Station where he reported the offence and referred the complainant to Taveta Sub-District hospital to which the complainant was admitted for three days.

The appellant was arrested and charged as already stated. In his unsworn testimony the appellant denied the offence and stated that the complainant who suffers from epilepsy is a liar.

Upon analyzing the evidence of both the prosecution and that of the appellant, the Learned Senior Resident Magistrate found the appellant guilty as charged, convicted him and sentenced him to 24 years imprisonment. The appellant was not satisfied and has appealed to this court against both conviction and sentence. When the appeal came up before me for hearing, the appellant appeared in person and Mr. Onserio, Learned State Counsel appeared for the Republic. Having previously filed written submissions, the appellant relied upon the same. The appellant raised the following issues: that he was convicted on uncorroborated evidence of the complainant and further that his defence was improperly rejected.

Mr. Onserio on his part submitted that the appellant was convicted on sound evidence and his conviction was safe. With regard to sentence, the Learned State Counsel submitted that the same was lawful and should not be disturbed.

This is a first appeal and this court has a duty to re-evaluate and reconsider the evidence which was adduced before the Learned Senior Resident Magistrate and come to its own independent finding bearing in mind that it did not have the advantage of seeing or hearing the witnesses testify. (See the case of **Okeno – v – Republic: [1972] EA 32**). I have gone over the record in detail and note that the complainant was a blood relative of the appellant. There is therefore no question of mistaken identity and indeed no such challenge was raised. The complainant gave a detailed account of the defilement and reported to her teachers PW 4 and PW 5. She was examined by PW 1, Dr. Henry Ng'eno the very next day after the defilement. The doctor observed tenderness on her left wrist, thighs and right side of her stomach. He also noted that her labia minora was bruised. There were pus cells in her genitalia. It was significant that puss cells were also noted in the appellant's urine. The doctor produced the P3 he had completed on the complainant and the appellant.

There can therefore be no question want of corroboration. If the same was required it was provided by the evidence of PW 4, PW 5 and the medical evidence. The Sexual Offences Act No. 3 of 2006 now authorizes the court to convict on uncorroborated evidence of a child of tender years in criminal cases involving sexual offences if for reasons to be recorded the court is satisfied that the victim is telling the truth. In this case, the Learned Senior Resident Magistrate stated as follows:

“On evaluation of the evidence on record the court notes the consistency and detailed nature of the complainant's testimony. She impressed the court as a credible witness. She knew what she was talking about and her epilepsy condition notwithstanding she had clarity of thought her mental facilities were not impaired as the accused implied.....”

In any event, the Children Act No. 8 of 2001 defines a child of tender years as one under the age of ten years. The complainant was aged 12 years. Her evidence was therefore not of a child of tender years and even if she had been, the Learned Senior Resident Magistrate was perfectly entitled to convict on her

uncorroborated evidence as he was satisfied that the complainant was telling the truth.

In the premises, I have come to the conclusion that the appellant was convicted on sound evidence as analysed above. His defence was accordingly properly rejected. His appeal against conviction has no merit and is dismissed.

With regard to the sentence of 24 years imprisonment, the same was lawful but the charge sheet indicated that the appellant at the time he was charged was 60 years. He is now 62 years of age. If he serves the 24 years, he will leave prison when he will be aged 84 years. In the circumstances, I am inclined to interfere. Accordingly, the appellant's appeal against sentence succeeds. The sentence of 24 years imposed upon the appellant is set aside. The appellant shall now serve 20 years imprisonment from the time he was convicted.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JUNE 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

The Appellant and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

16TH JUNE 2009